**PENDAKWA RAYA**

**v.**

**I KIANG ENDIN WUN**

HIGH COURT MALAYA, KANGAR
MOHD. SAARI YUSOFF JC
[CRIMINAL APPEAL NO. 47-7-91]
3 JANUARY 1992

***EVIDENCE:*** *Prosecution's omission to tender report which is not substantive evidence whether material - Defence had notice of such report but failed to apply to the Court to have it admitted.*

***EVIDENCE:*** *Investigating diary - Whether admissable - When said diary wrongly admitted for want of objection by the defence.*

The prosecution's case was that on 22 April 1986 at about 3.15 p.m. acting on a tip off PW2 & PW6 confronted T (the accused) at the footpath immigration check-point Padang Besar Perlis. T was unable to produce a travelling document to PW6 but only produced NR7 (P6) (temporary IC). Thereafter when a body search was made on T, PW2 felt something hard beneath the shirt around the stomach. At this juncture, T dashed off out of the building and ran towards the overhead bridge. *Inter alia* following a chase T was finally arrested and at the time of the incident, PW2 discovered that T was carrying the impugned drugs beneath the shirts strapped to the stomach by means of a belt (P7). The chemist (PW1) confirmed that the impugned drugs was heroin weighing 815.9 grammes, which was a dangerous drug as defined under DDA, 1952.

The issue before the Court was whether the accused had exclusive possession of the impugned drugs and whether upon the evidence the presumption under s. 37(da) DDA 1952 would apply.

**Held:**

**[1]** Pertaining to Report No. 683/86 referred to in PW2's evidence, it is trite law that such report is not substantive evidence but serves only as corroborative evidence. Hence the prosecution's omission to tender the report as an exhibit does not detract the probative value of PW2's evidence.

**[2]** With regard to the investigation diary, it is trite law that such diary is not admissable except that it may be used for purpose of refreshing memory. The fact that the said diary was wrongly admitted for want of objection by the defence did not render such document admissable. To put it differently, no inadmissable document wrongly admitted during the trial would change its character so as to make it admissable.

*[Accused is found guilty and convicted.]*

**Cases referred to:**
*Chan Pean Leon v. PP [1956] 22 MLJ 237* ***(foll)***
*Haw Tua Tau v. PP [1981] CLJ (Rep) 11* ***(foll)***
*PP v. Foong Chee Cheong [1970] 1 MLJ 97* ***(foll)***
*Munusamy v. PP [1987] CLJ (Rep) 221* ***(cons)***
*PP v. Er Ah Kiat [1966] 1 MLJ 9* ***(cons)***

**Legislation referred to:**
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a), (2)
Evidence Act 1950, s. 157

**Other source referred to:**
Stephen's Digest (9th Edn., p. 304)

*For the prosecution - Amarjit Singh; M/s. Ramli Amarjit & Co.*
*For the accused - A.C. Fernandis, Timbalan Pendakwa Raya*

**JUDGMENT**

**Mohd. Saari Yusoff JC:**

The charge against the accused was as follows:
That you on 22 April 1986 at about 3.25 p.m. at Jalan Kolam Air Railway Gate Padang Besar, in the District of Kangar, in the State of Perlis, on your own behalf, did traffic in dangerous drug, to wit. 815.9 grammes of heroin, in contravention of the provisions of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1983) and thereby committed an offence punishable under s. 39B(2) of the same Act.

For purpose of conveniance and brevity, the accused is hereinafter referred to as "T".

Briefly, the prosecution's case was that on 22 April 1986 at about 3.15 p.m., acting on a tip-off, Sjn. Marzuki (PW2) and P.I. Ismail (PW6) confronted T at the footpath immigration check-point Padang Besar, Perlis.

T was unable to produce a travelling document to PW6 but only produced NR7 (P6) (temporary IC). Thereafter, when PW2 was making a body search of T, PW2 felt something hard beneath the shirt around the stomach. At that juncture, T dashed off out of the building and ran towards the overhead bridge.

During the chase, after T failed to stop despite of being challenged by PW2, PW2 fired two shots of which the second shot hit T's leg while T was on the steps of the overhead bridge.

From the overhead bridge, T fled to the railway crossing and there, T was confronted by two civilians (PW3 and another) who arrested him. During the chase, PW2 did not lose sight of T.

At the time of the incident, T was clad in trousers and two shirts namely collared T shirt and long-sleeved shirt. After the arrest, PW2 discovered that T was carrying the impugned drugs beneath the shirts strapped to the stomach by means of a belt (P7).

The chemist (PW1) confirmed that the impugned drugs was heroin weighing 815.9 grammes, which was dangerous drugs as defined under DDA, 1952.

Upon those evidence outlined above and surrounding circumstances of the case, I find and so hold that T had exclusive possession (*Chan Pean Leon v. PP* [1956] 22 MLJ 237) of the impugned drugs.

"Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edn., p. 304):

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

Further, as the weight of the impugned drugs was 815.9 grammes, I hold that the presumption under s. 37(da) DDA 1952 would apply.

At the close of the prosecution's case, I hold that a *prima facie* case is made out within the principle as laid down in celebrated case of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11.

The defence's story was that on 22 April 1986 at about 3.25 p.m. T was returning to Sik Kedah from Pekan Siam (Thai border town) in the company of a Thai named Luang Boon. From the immigration check-point, T and Luang Boon proceeded to railway station Padang Besar to wait for the train.

It was while at the railway station that T was confronted by PW2 who demanded to see T's passport. At that juncture, on seeing Luang Boon running away, T also fled. T's reason for doing so was because he had no passport.

Thereafter, T was shot in the leg and was arrested. He denied carrying the impugned drugs at any time.

In a nutshell, impliedly the defence is saying, the case against him was a framed-up. However, I could not accept the defence's case for the following reasons:

Firstly, there was ample evidences to say that PW6 stopped T at the immigration check-point, followed by PW2 making a body search of T. During the body search, T fled towards the overhead bridge. I could not accept the defence's version in that T went to the railway station first before running away.

Secondly, there was overwhelming evidence (which evidence is inherently credible) to say that the impugned drugs were strapped to T's stomach beneath the shirts. On this point, PW2's evidence was reinforced by that of PW3 (a civilian) and Insp. Oh (PW5).

Thirdly, if it was true that T was not carrying any incriminating object (which averment was against the weight of evidence), I find it inherently incredible for T to flee on being asked to produce his passport. Further, there was no justification for PW2 to shoot T, had the latter not carried anything incriminating such as drugs.

With regard to veracity of the prosecution witnesses, I find their evidence to be straightforward, consistent with one another and cogent. Hence, I accept their evidence particularly PW2, PW3, PW9, PW1 and PW6. However, in the case of T, having regard to inherent improbabilities of his evidences taken together with the demeanour of T, I hold that T is not a witness of truth.

With regard to identification of the impugned drugs (P5A & B), in the case of PW2 (the arresting officer), he attested his signature on the seized drugs and dated it. In the case of PW9 (IO), he marked "E" and "E1". It is true that the signature of PW2 was not visible on either of the exhibit. However, the learned defence Counsel conceded that there was trace of red colour with one inverted comma on package (P5A) while the marking "E1" on package (P5B) was legible though not distinct.

Regarding the texture and appearance of the seized drugs, I accept the chemist's evidences in that over a period of time, heroin would solidify and change colour due to degradation. The degree of degradation varied depending on condition of storage.

Looking at the evidences as a whole, coupled with the fact that there was no break in the chain of evidences, I am satisfied that the impugned drugs were the very drugs seized from T.

Pertaining to Padang Besar Report No. 683/86 referred to in PW2's evidences, it is trite law that such report is not substantive evidence ( *PP v. Foong Chee Cheong* [1970] 1 MLJ 97) but serves only as corroborative evidence - s. 157 Evidence Act 1950. Hence, the prosecution's omission to tender the report as exhibit does not, in my view, detract the probative value of PW2's evidence. Further, it is noted that early in the trial the defence had notice of the report but refrained from applying to Court to have it admitted. As there was no deliberate attempt to withhold or suppress evidence (*Munusamy v. PP* [1987] CLJ (Rep) 221), I make no adverse inference against the prosecution's case.

With regard to the investigation diary (P13), it is trite law that such diary is not admissable except that it may be used for purposes of refreshing memory *PP v. Er Ah Kiat* [1966] 1 MLJ 9. The fact that the said diary was wrongly admitted for want of objection by the defence did not, in my view, render such document admissable. To put it differently, no inadmissable document wrongly admitted during the trial would change its character so as to make it admissable.

In considering the totality of the evidence and surrounding circumstances of the case, I find that the defence had failed to raise any reasonable doubt as to the guilt of T. Further, the defence had failed to rebut the presumption under s. 37(da) DDA 1952 on balance of probabilities. Having heard the arguments of the learned defence Counsel and DPP, I am satisfied that the case against T had been proved beyond reasonable doubt. Accordingly, T is found guilty and convicted. T is sentenced to suffer death by hanging.

Also found at [1992] 1 CLJ 690